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Supreme Court, U.S.
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92-1928

No.

IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1992

Darryl Ray Evans,
Petitioner,
v.
United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did The Court Of Appeal Erroneously Fail To Apply The Rule Of Lenity As Required By This Court's Recent Opinion In United States v. Thompson/ Center Arms Co., 504 U.S. __, 112 S.Ct. 2102, 119 L.Ed.2d 308 (1992)?

2. Should This Court Resolve A Conflict Between The Circuits On The Degree Of Knowledge That The Government Must Prove In Order To Obtain A Conviction For Violation Of 26 U.S.C. § 5861(d)?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, DARRYL RAY EVANS, respectfully prays that a Writ of Certiorari issue to review the published opinion of the United States Court of Appeals for the Ninth Circuit filed on October 29, 1992, affirming the judgement of conviction entered by the United States District Court for the Central District of California.

LOWER COURT OPINION

The opinion of the United States Court of Appeals for the Ninth Circuit in this case is reported in **United States v. Evans,** 978 F.2d 1112 (9th Cir. 1992).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. That Court entered its order denying the petition for rehearing on January 5, 1993.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

26 U.S.C. § 5845(a) "Firearm.- The term 'firearm' means...(6) a machinegun."

26 U.S.C. § 5845(b) "Machinegun.- The term 'machinegun' means any weapon which shoots, is designed

to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include...any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person."

26 U.S.C. § 5861(d) "It shall be unlawful for any person...to... possess a firearm which is not registered to him..."

STATEMENT OF THE CASE

Petitioner was arrested on April 17, 1990 after agents of the Bureau of Alcohol, Tobacco and Firearms ("ATF") searched his home and seized a number of weapons which they believed to be illegally possessed. A three count indict-

ment was filed on May 1, 1990 charging Petitioner with violations of the National Firearms Act. A superseding indictment was filed on July 17, 1990 adding two additional counts. Count five of the superseding indictment alleged that Petitioner knowingly possessed a firearm, namely a "combination of parts from which a machinegun can be assembled...which firearm had not been registered to him..." This count involved a legal semi-automatic M-11 pistol possessed in the same apartment with a legal bolt assembly designed as a replacement part for an M-11 machinegun.

At trial the Government presented an ATF expert who showed a videotape to the jury of a test firing of the M-11 after he had modified it by replacing the closed bolt assembly with the open bolt assembly. He testified that the "...lever being pulled to the rear bolt

assembly - to the rear; letting it go" caused two rounds to fire. In the video-tape it is seen that the conventional curved metal trigger was not utilized; the two shots fired only by manually pulling back the open bolt assembly and manually releasing it.

At the close of the case the district court failed to instruct the jury that the Government had to prove that Petitioner was aware that the combination of the M-11 and open bolt assembly had characteristics that would require the combination to be registered. The Petitioner did not request such an instruction.

During deliberations the jury sent the following written question to the court: "Please define trigger as it pertains to the instructin (sic) on instruction #8 (B) machinegun." After

rejection of Petitioner's offer of a dictionary definition, and over the Petitioner's objection, the trial court answered the jury's question as follows: "In reply to your note # 2, a trigger is defined as anything that releases the bolt to cause it to fire."

The jury subsequently returned a verdict of guilty on count 5 related to the M-11 and parts, and found the Petitioner not guilty on the four other counts.

Following the Petitioner's conviction this Court decided **United States v. Thompson/Center Arms Co.,** 504 U.S. ___, 112 S.Cr. 2102, 119 L.Ed.2d 308 (1992), and Petitioner cited this decision in his reply brief for authority that the rule of lenity required reversal of Petitioner's conviction due to the trial court's overbroad definition

of the term "trigger", where Congress had failed to explicitly define the meaning and where there was no legislative authority to assist in understanding Congress' intentions. In addition, Petitioner argued that the trial court erred in failing to adequately instruct the jury on the degree of knowledge that the Government had to prove to obtain a conviction under 5861(d).

The Court of Appeal did not discuss the implications of **Thompson/ Center Arms**, asserting in footnote 2 of their opinion that the term "trigger" was not ambiguous. In addition, the Court of Appeal pointed out that the authority in the Ninth Circuit did not require the Government to present proof of a defendant's knowledge of the characteristics of the weapon that would alert him to the registration

requirement. The Court of Appeal therefore affirmed Petitioner's conviction.

SUMMARY OF ARGUMENT

In June 1992 this Court issued the **Thompson/Center Arms Co.** decision, in which it analyzed the term "made" as utilized by Congress in the National Firearms Act. In the instant case the Court of Appeal could find no legislative history in support of the definition of "trigger" that the trial court gave to the jury, so it clearly erred in disregarding this Court's conclusion in **Thompson/Center Arms Co.** that the rule of lenity must be applied under such circumstances. Where the term "trigger", as utilized by Congress in the definition of "machinegun" set forth in 26 U.S.C. § 5845(b), clearly has no plain, unambiguous, meaning, the Court of Appeal

was left with an ambiguous statute and it erroneously failed to follow the virtually indistinguishable decision of this Court in **Thompson/Center Arms Co.**.

On the issue of what proof of knowledge the Government must present to support a conviction for violation of 26 U.S.C. § 5861(d) the concurring opinion in **United States v. O'Mara,** 963 F.2d 1288, 1292-96 (9th Cir. 1992) sets forth the constitutional defect inherent in the Ninth Circuit's strict liability view of the statute, and the conflict among the circuits on the issue.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's opinion completely ignored this Court's decision in **Thompson/Center Arms Co.** on application of the rule of lenity. Where this Court's guidance on interpretation of

terminology in the National Firearms Act was ignored by the Ninth Circuit, this Court clearly has the duty to grant certiorari in this case to insure that the decisions of this Court are followed by a Court of Appeal. Rule 10.1(c), **Supreme Court Rules.**

This Court also has an interest in resolving conflicts among the circuits. Rule 10.1(a), **Supreme Court Rules.** Presently there are six circuits, including the Ninth Circuit, which hold that conviction of a defendant for possessing an unregistered firearm does not require the Government to prove that the defendant knew the characteristics of the weapon that brought it within the registration requirement. **United States v. O'Mara,** 936 F.2d 1288 (9th Cir. 1992); **United States v. Ross,** 917 F.2d 997, 999-1001 (7th Cir. 1990), **cert. denied,** 111 S.Ct. 1078;

United States v. Mittleider, 835 F.2d 769, 774 (10th Cir. 1987), **cert. denied,** 108 S.Ct. 1279 (1988); **United States v. Shilling,** 826 F.2d 1365, 1367-68 (4th Cir. 1987), **cert. denied,** 108 S.Ct. 777 (1988); **United States v. Gonzalez,** 719 F.2d 1516, 1522 (11th Cir. 1983), **cert. denied** 104 S.Ct. 1312 (1984); **Morgan v. United States,** 564 F.2d 803, 805-06 (8th Cir. 1977). There are three circuits that hold that the Government must present such proof. **United States v. Harris,** 959 F.2d 246, 259-261 (D.C. Cir. 1992); **United States v. Anderson,** 885 F.2d 1248, 1250-55 (5th Cir. 1989)(en banc); **United States v. Williams,** 872 F.2d 773, 774-77 (6th Cir. 1989). This Court should take this opportunity to resolve a conflict that has deeply divided the circuits.

CONCLUSION

For the reasons cited above it is respectfully submitted that a Writ of Certiorari should issue to review the order and opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: April 4, 1993

Respectfully submitted,

Gerald V. Scotti

GERALD VINCENT SCOTTI
Attorney for Petitioner
DARRYL RAY EVANS

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DARRYL RAY EVANS, a/k/a Derrick Savage, *Defendant-Appellant.*	No. 91-50306 D.C. No. CR-90-0339-KN-1 OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Argued and Submitted
October 5, 1992—San Francisco, California

Filed October 29, 1992

Before: Thomas Tang, Harry Pregerson, and Arthur L. Alarcon, Circuit Judges.

Opinion by Judge Pregerson

SUMMARY

Criminal Law and Procedure/Evidence/Juries/Sentencing

Affirming a district court judgment and sentence for possession of an unregistered machine gun, the court of appeals held that, because knowledge is not an element of that offense, the government did not have to prove that appellant

knew the firearm he possessed was subject to a registration requirement.

Appellant Darryl Ray Evans was convicted by a jury of possessing an unregistered machine gun. Evans challenged the district court's instruction to the jury concerning the definition of "trigger." He also argued that the district court erred by failing to instruct the jury that he knew the firearm he possessed was subject to registration, and that the evidence was not sufficient to convict him.

[1] The court held that the district court's definition of trigger was consistent with the language of the statute and the intent of Congress. [2] In addition, the court held that lack of knowledge is not a defense to possession of an unregistered machine gun because under the cases of this circuit, there is strict liability under the statute when the firearm in question, by its very nature or appearance, alerts its owner of the likelihood of regulation. [3] Evans' contention that he did not know he possessed an aggregate machine gun was irrelevant. He was alerted to the likelihood of regulation by the label and the obvious dangerous character of his machine gun. Knowledge was therefore not an element of Evans' offense. [4] Similarly, there could be no ineffective assistance of counsel based on defense counsel's failure to move for judgment of acquittal at the close of the evidence. The evidence was sufficient to convict Evans. No prejudice resulted from defense counsel's failure to move for judgment of acquittal. [5] In addition, because the district court knew it had discretion to depart downward on the basis of aberrant behavior or limited culpability, the appeals court lacked jurisdiction to review the district court's discretionary refusal to depart downward from the guidelines.

COUNSEL

Gerald V. Scotti, Beverly Hills, California, for the defendant-appellant.

Matthew W. Frank, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

OPINION

PREGERSON, Circuit Judge:

Darryl Ray Evans appeals his conviction and sentence for possession of an unregistered machine gun in violation of 26 U.S.C. § 5861(d). We have jurisdiction under 28 U.S.C. § 1291, and affirm.

BACKGROUND

Evans was charged in a superseding five count indictment with violations of the National Firearms Act ("NFA"). The jury acquitted Evans on four of the five counts but convicted him on the fifth. Count five charged Evans with violating 26 U.S.C. § 5861(d), possession of an unregistered machine gun.[1] Evans raises several challenges to his conviction and sentence. We discuss each in turn.

[1]Evans possessed an M-11/9mm semi-automatic pistol ("M-11 pistol") and a fixed-firing pin bolt assembly labeled "M-11 SMG." The pistol and the bolt assembly constitute a machine gun within the meaning of 26 U.S.C. § 5845(a)(6). That section defines a machine gun as

> any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include . . . *any combination of parts from which a machine gun can be assembled* if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845(b) (emphasis added).

ANALYSIS

I. Jury Instructions

A. Definition of Trigger

Evans contends the district court erred when it defined trigger as "anything that releases the bolt to cause . . . [the weapon] to fire." During jury deliberations, the jury foreman had asked the court to define the term trigger for purposes of 26 U.S.C. § 5845(b).

Evans objected to the district court's definition and renews his objection on appeal. We find no error in the district court's instruction on this issue.

[1] Whether a jury instruction misstates the elements of an offense is a question of law that we review de novo. *United States v. Armstrong*, 909 F.2d 1238, 1243 (9th Cir.), *cert. denied*, 111 S. Ct. 191 (1990). We conclude that the district court's definition of trigger was consistent with the language of the statute and with Congress's intent. *See Commissioner v. Engle*, 464 U.S. 206, 217 (1984) (discussing purposes of NFA).

The district court's definition comports with the structure and language of the NFA by focusing on the action that enables a firearm to shoot automatically without manual reloading. The legislative history of the NFA provides further support for the definition of trigger given by the district court. *See United States v. Peterson*, 475 F.2d 806, 810-11 (9th Cir.), *cert. denied*, 414 U.S. 846 (1973).[2]

[2]Evans argues on appeal that the plain meaning of trigger in 28 U.S.C. § 5845(a)(6) is a curved metal trigger. This argument is without merit because it defines trigger completely out of context. As used in § 5845(a), "by a single function of the trigger" describes the action that enables the weapon to "shoot . . . automatically . . . without manual reloading," not

B. Knowledge Requirement

Evans argues that the district court erred by failing to instruct the jury that the government must prove that Evans *knew* the firearm he possessed was subject to a registration requirement. We disagree.

Evans neither requested nor objected to the absence of a knowledge instruction at trial. Consequently, we review for plain error. *See* Fed. R. Crim. P. 30 and 52(b); *see also United States v. Anguiano*, 873 F.2d 1314, 1319 (9th Cir.), *cert. denied*, 493 U.S. 969 (1989). Plain error exists if the error was highly prejudicial and there is a high probability that the error affected substantial rights. Fed. R. Crim. P. 52(b); *United States v. Bryan*, 868 F.2d 1032, 1038-39 (9th Cir.), *cert. denied*, 493 U.S. 858 (1989).

[2] As a general rule, knowledge that a firearm is subject to a registration requirement is not an element of the offense of possessing that firearm. *United States v. O'Mara*, 963 F.2d 1288, 1291 (9th Cir. 1992). The government need only show that (1) the defendant knew he possessed a firearm (in this case, a machine gun as defined in § 5845(a)(6)); and (2) the machine gun is unregistered. Lack of knowledge is not a defense to possession of an unregistered machine gun because "[u]nder the cases of this circuit, there is strict liability under the statute when the firearm in question, by its very nature or appearance, alerts its owner of the likelihood of regulation." *O'Mara*, 963 F.2d at 1291.

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the "trigger" mechanism. Further, Evans' definition would lead to the absurd result of enabling persons to avoid the NFA simply by using weapons that employ a button or switch mechanism for firing.

In addition, Evans argues that the rule of lenity applies in his favor. We disagree. The touchstone of the rule of lenity is statutory ambiguity. *Bifulco v. United States*, 447 U.S. 381, 387 (1980). The term trigger is not ambiguous. Consequently, the rule of lenity does not apply. *Moskal v. United States*, 111 S. Ct. 461, 465 (1990).

We recognize two narrow exceptions to this general rule that knowledge is not an element of the offense of possessing an unregistered firearm. The first exception applies if there are *no external indicia* to indicate the likelihood of regulation. *United States v. Herbert*, 698 F.2d 981, 987 (9th Cir.), *cert. denied*, 464 U.S. 821 (1983) (an internally modified semi-automatic machine gun). The second exception arises where a firearm is inoperable and *obviously not dangerous*. *United States v. Kindred*, 931 F.2d 609, 612 (9th Cir. 1991) (an inoperable World War I vintage German machine gun). The touchstone of these exceptions is that the weapons involved did not alert their owners to the likelihood of regulation.

These exceptions do not apply in Evans' case because the M-11 pistol and bolt assembly had external indicia alerting Evans to the likelihood of regulation. Specifically, the bolt assembly had attached to it a label reading "M-11 SMG," a common abbreviation for submachine gun. Furthermore, the M-11 pistol was fully operable and clearly dangerous even without the bolt assembly.

[3] Evans' contention that he did not know he possessed an aggregate machine gun is irrelevant. Evans was alerted to the likelihood of regulation by the label and the obvious dangerous character of his machine gun. Knowledge was therefore not an element of Evans' offense.

II. Sufficiency of Evidence and Ineffective Assistance of Counsel

Evans argues that the evidence was not sufficient to prove that he knew he possessed a firearm that was subject to regulation. The argument fails. Knowledge is not an element of 26 U.S.C. § 5861(b), and Evans does not fall within the narrow exceptions of *Herbert* and *Kindred*.

[4] Similarly, there can be no ineffective assistance of counsel based on defense counsel's failure to move for judg-

ment of acquittal at the close of the evidence. The evidence was sufficient to convict Evans. No prejudice resulted from defense counsel's failure to move for judgment of acquittal. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

III. Downward Departure from Guidelines Sentence

Finally, Evans contends that the district court erroneously believed it lacked authority to depart downward from the federal sentencing guidelines based on either aberrant behavior or limited culpability. The argument is without merit.

[5] The record shows that the district court knew that it had discretion to depart downward on either of these grounds. The court concluded that departure was not warranted. We do not have jurisdiction to review a district court's discretionary refusal to depart downward from the guidelines. *United States v. Sanchez*, 914 F.2d 1355, 1363 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1626 (1991); *United States v. Morales*, 898 F.2d 99, 103 (9th Cir. 1990).

CONCLUSION

Evans' conviction and sentence are AFFIRMED.

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 91-50306
Plaintiff - Appellee,	D.C. No. CR-90-0339-KN-1
v.	O R D E R
DARRYL RAY EVANS, a/k/a Derrick Savage,	
Defendant - Appellant.	

Before: TANG, PREGERSON, and ALARCON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested an en banc hearing. Federal Rule 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Superseding Indictment Filed July 17, 1990

COUNT FIVE

[26 U.S.C. § 5861(d), 5872]

On or about April 17, 1990, in Los Angeles County, within the Central District of California, defendant DARRYL RAY EVANS, aka Derek Savage, knowingly possessed a firearm, namely the following combination of parts from which a machinegun can be assembled: a M11/9mm pistol, serial number 88-0011951, together with a fixed firing pin bolt assembly, which firearm had not been registered to him in the National Firearms Registration and transfer Record.

The Grand Jury further alleges that the above-described firearm is subject to forfeiture pursuant to the provisions of Title 26, United States Code, Section 5872.

A TRUE BILL

CERTIFICATE OF SERVICE BY MAIL

I, Barry Feldman, certify that a three copies of:

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

were served on counsel for the United States of America addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

Terre Bowers
United States Attorney
Matthew Frank
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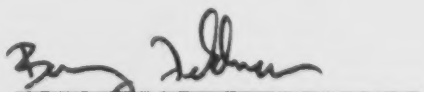
312 N. Spring Street
Los Angeles, CA 90012

by first class U.S. Mail.

Executed this 4th day of April, 1993.



BARRY FELDMAN

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OCTOBER TERM, 1993

DARRYL RAY EVANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial judge properly instructed the jury concerning the definition of the term "trigger," as used in 26 U.S.C. 5845(b).

2. Whether, in a prosecution for possession of an unregistered machinegun in violation of 26 U.S.C. 5861(d), the district court's omission of a detailed instruction concerning the element of knowledge was plain error.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 13-19) is reported at 978 F.2d 1112.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1992. On January 5, 1993, the court of appeals denied a petition for rehearing. Pet. App. 20. The petition for a writ of certiorari was filed on April 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of possession of an unregistered machinegun, in violation of 26 U.S.C. 5861(d).[1] He was sentenced to 21 months' imprisonment, to be followed by two years' supervised release. The court of appeals affirmed. Pet. App. 19.

1. The National Firearms Act (NFA), 26 U.S.C. 5801-5872, prohibits any person from receiving or possessing a firearm that is not registered to him in the National Firearms Registration and Transfer Record. 26 U.S.C. 5861(d). Section 5845(a)(6) of the Act defines the term "firearm" to include "a machinegun." Under 26 U.S.C. 5845(b),

> [t]he term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include * * * any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

2. The evidence at trial showed that on April 17, 1990, agents of the Bureau of Alcohol, Tobacco and Firearms (ATF) executed a search warrant at petitioner's residence and seized numerous weapons, including an M-11 nine millimeter semi-automatic pistol, which they found in a safe in petitioner's bedroom closet. Gov't Excerpt of Record 2, 4. The investigators also found a conversion

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[1] Petitioner was acquitted on three other counts of possession of unregistered firearms, in violation of 26 U.S.C. 5861(d), and on one count of possession of a firearm not identified by a serial number, in violation of 26 U.S.C. 5861(i).

bolt assembly in petitioner's bedroom, which bore a $125 price tag and a label reading "M-11 SMG," an abbreviation for an M-11 submachinegun. Gov't Excerpt of Record 5, 12. The M-11 was not registered in the National Firearms Transfer Record. See Pet. App. 21.

The purpose of the M-11 SMG bolt assembly was to convert an M-11 semi-automatic pistol, such as the one seized in petitioner's bedroom safe, into a fully automatic machinegun. An ATF agent testified at trial that, by substituting the M-11 SMG bolt assembly found on petitioner's desk for the bolt assembly of an M-11 semi-automatic pistol, a person could easily transform the weapon into a fully automatic firearm. When converted in that manner, an operator could fire more than one round at a time by pulling the bolt carrier and releasing it rather than by squeezing the trigger. Pet. Excerpt of Record 10-13.

In its charge to the jury concerning the elements of a violation of Section 5861(d), the district court explained the element of knowledge as follows:

> Although the defendant's possession of a firearm must have been knowing, the government need not prove that the defendant knew his possession was against the law. Even if you conclude that the defendant believed that his possession of a firearm was legal, or that he had some other motive, you must find him guilty of the offense charged if you conclude beyond a reasonable doubt that he knowingly possessed an unregistered firearm as charged[.]

Pet. C.A. Br. 25-26. Petitioner did not object to that instruction. Pet. C.A. Br. 26.

During the jury's deliberations, the foreman requested that the trial judge define the term "trigger," as used in the definition of "machinegun" in 26 U.S.C. 5845(b). Pet. Excerpt of Record 43. Petitioner's counsel

argued that the term "trigger" meant "the part of the action of a firearm moved by the finger to release the hammer or firing pin in firing." Pet. Excerpt of Record 28. Over petitioner's objection, the district court instructed the jury that "a trigger is defined as anything that releases the bolt to cause it to fire." Pet. Excerpt of Record 45.

3. On appeal, petitioner renewed his objection that the district court had instructed the jury incorrectly on the definition of the term "trigger." The court of appeals rejected that claim, reasoning that the district court's definition "comports with the structure and language of the NFA by focusing on the action that enables a firearm to shoot automatically without manual reloading." Pet. App. 16.

Petitioner also argued that the trial judge erred in failing to instruct the jury that, in order to convict him of possession of an unregistered machinegun, it was required to find that he knew he possessed a dangerous device of a type that would alert him to the likelihood of regulation. Pet. C.A. Br. 26. Because petitioner had neither requested an instruction concerning the element of knowledge at trial nor objected to the instruction given by the trial court, the court of appeals considered only whether the alleged instructional defect constituted plain error. Because the instruction given fully comported with the law of the circuit and petitioner was on notice concerning the M-11's automatic firing capabilities in any event, the court of appeals found no plain error. Pet. App. 17-18.

ARGUMENT

1. Petitioner contends (Pet. 8, 9-10) that the trial court's instruction concerning the term "trigger" was ambiguous and overbroad.

Although 26 U.S.C. 5845(b) defines a "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot * * * by a single function of the trigger," the statute does not further define the term "trigger." In the absence of such a definition, "[i]t is a fundamental canon of statutory construction that words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989). In the context of Section 5845(b), the term "trigger" was obviously intended not to be limited to a particular type of firing mechanism, such as a curved metal bar that initiates the firing sequence when squeezed with the finger, but to include any mechanism that activates a firearm to shoot more than one shot by a single function. As the court explained in *United States* v. *Jokel*, 969 F.2d 132, 135 (5th Cir. 1992):

> To construe "trigger" to mean only a small lever moved by a finger would be to impute to Congress the intent to restrict the term to only one kind of trigger, albeit a very common kind. The language [of the statute] implies no intent to so restrict the meaning, and we will not read such intent into section 5845[(b)].

See also *United States* v. *Oakes*, 564 F.2d 384, 388 (10th Cir. 1977) (refusing to confine the term "trigger" in Section 5861(d) to a particular type of triggering mechanism), cert. denied, 435 U.S. 926 (1978).[2]

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[2] Moreover, a term not defined by statute should "normally [be] construe[d] * * * in accord with its ordinary or natural meaning." *Smith* v. *United States*, 113 S. Ct. 2050, 2054 (1993), citing *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). The ordinary meaning of the term "trigger" is not restricted to a small lever pulled by a finger, but is broad enough to include any mechanism

Petitioner's construction of the term "trigger" is also inconsistent with the congressional objective, in enacting the NFA, of depriving criminals of certain particularly dangerous types of weapons, including machineguns. See S. Rep. No. 1303, 86th Cong., 2d Sess. 2 (1960). As the court of appeals observed, "[petitioner's] definition would lead to the absurd result of enabling persons to avoid the NFA simply by using weapons that employ a button or switch mechanism for firing." Pet. App. 17 n.2.

Petitioner also maintains that the rule of lenity requires that, absent further definition in the NFA, the term "trigger" must be accorded its narrowest possible meaning. As this Court recently explained in *Smith* v. *United States*, 113 S. Ct. 2050 (1993), however, "[t]he mere possibility of articulating a narrower construction [of a term in a statute] does not by itself make the rule of lenity applicable. Instead, that venerable rule is reserved for cases where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute." *Id.* at 2059 (internal quotation marks omitted). In this case, "[i]mposing a more restrictive reading of the [term 'trigger'] does violence not only to the structure and language of the statute, but to its purpose as well." *Id.* at 2060; see *United States* v. *Jokel*, 969 F.2d at 135 (holding that application of the rule of lenity to narrow the definition of "trigger" would defeat the intent of Congress).[3]

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that is used to initiate the firing sequence. See *Jokel*, 969 F.2d at 134-135, citing *Webster's Third International Dictionary of the English Language* 2444 (1976).

[3] Petitioner is mistaken in arguing (Pet. 8, 9-10) that *United States* v. *Thompson/Center Arms Co.*, 112 S. Ct. 2102 (1992), supports application of the rule of lenity. In *Thompson/Center*, the Court addressed the question whether the term "making," as used in the NFA (26 U.S.C. 5821), includes a kit consisting of a pistol together with components that permit its conversion into a short-

2. Noting a conflict among the circuits on the question, petitioner also claims (Pet. 10-11) that he was entitled to an instruction that, in order to obtain a conviction under Section 5861(d), the government was required to establish that he knew that his machinegun possessed the characteristics that made it subject to registration under the NFA.

In *Staples* v. *United States*, cert. granted, 113 S. Ct. 2412 (1993) (No. 92-1441), the Court granted certiorari on the question whether, in order to convict a defendant of possessing an unregistered machinegun, in violation of 26 U.S.C. 5861(d), it is necessary to prove that he knew the firearm possessed all the physical characteristics of a machinegun. It is, however, unnecessary to hold this case pending the Court's decision in *Staples*. As petitioner concedes (Pet. 5; Pet. C.A. Br. 26), at trial he neither objected to the instruction given nor proposed an alternative.[4] See Pet. App. 17. He is therefore entitled to relief only if the alleged instructional defect constitutes

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barreled rifle that must be registered under the NFA. The Court found it necessary to apply the rule of lenity and construed the term not to embrace such kits because "[a]fter applying the ordinary rules of statutory construction [the Court was] left with an ambiguous statute." 112 S. Ct. at 2109. As explained above, the term "trigger" in 26 U.S.C. 5845(b) does not suffer from any similar ambiguity.

[4] Even in the court of appeals, petitioner did not argue that he was entitled to an instruction that in order to convict him the jury must find that he knew that he possessed a device with all of the physical characteristics of a machinegun. Instead, he argued only that he was entitled to essentially the same instruction that was used in *Staples*: that "the Government was required to prove that Appellant knew that these otherwise legal items could be combined together into a 'dangerous device of a type that would alert one to the likelihood of regulation.'" Pet. C.A. Br. 22; see also Pet. C.A. Br. 26.

plain error. See Fed. R. Crim. P. 30, 52(b); *Singer* v. *United States*, 380 U.S. 24, 38 (1965).

Under Fed. R. Crim. P. 52(b), a plain error may be noticed only if it "affect[s] substantial rights." As the Court explained in *United States* v. *Olano*, 113 S. Ct. 1770, 1778 (1993), that "means that the error must have been prejudicial: It must have affected the outcome of the District Court proceedings." There was no such error here. The bolt assembly found in close proximity to the M-11 pistol in petitioner's bedroom bore a label ("M-11 SMG") showing that it was intended for use to convert an M-11 pistol to a fully automatic submachinegun. See Pet. App. 15 n.1. As there was therefore little doubt that petitioner knew that he possessed a "combination of parts" from which a machinegun within the meaning of 26 U.S.C. 5845(b) could be assembled, it is hardly surprising that he did not focus on the issue of knowledge at trial or ask for a detailed instruction on that issue. For the same reason, the failure of the trial court to give the instruction that petitioner now seeks did not affect the outcome of the trial. See *United States* v. *Sellers*, 926 F.2d 410, 417 (5th Cir. 1991) (no plain error when trial court failed to give instruction that government must prove defendant's knowledge that waste was hazardous because evidence left little doubt defendant knew of potential danger).

In any event, the instruction that was given is a legally adequate instruction concerning the knowledge element of the crime, regardless of how this Court decides *Staples*. The instruction required the jury to find that petitioner's "possession of the firearm must have been knowing" and that the jury could not convict petitioner unless it "conclude[d] beyond a reasonable doubt that [petitioner] knowingly possessed an unregistered firearm as charged." Pet. C.A. Br. 25-26. The instruction is adequate as a matter of law because it required

the jury to find knowing possession before convicting him. In the absence of an objection, the court's failure to elaborate on the meaning of "knowing" as applied to this case was not erroneous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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